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Attorneys for Rodolfo A. Camacho, Chapter 7 Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re:

Brake Brothers, LLC,

Debtor.

RODOLFO A. CAMACHO, in his capacity as the duly appointed Chapter 7 Trustee of Brake Brothers, LLC,

Plaintiff

v.

PATRICK V. WALBY aka PATRICK VINCENT WALBY aka PATRICK WALBY aka PATRICK V. WALRY aka PAT WALRY aka PATRICK VINCENT WALB aka PATRICK WALLY aka PAT WALDY aka PATRICK V. WALRY, an individual; PHILIP G. WALBY aka PHILIP GEORGE WALBY aka PHILIP WALBY, an individual; JUSTIN MCCANN aka JUSTIN L. MCCANN aka JUSTIN M. MCCANN aka JUSTIN M. KENWORTH, an individual; BRITTANNY MCCANN, an individual; JUAN SALAS, an individual; NOEMI GUTIERREZ, an individual; BEAVERTON BRAKE TEAM,

Case No. 14-32146-rld7

Adversary Proceeding No.

ADVERSARY COMPLAINT

(DECLARATORY JUDGMENT;
SUBSTANTIVE CONSOLIDATION;
FRAUDULENT TRANSFER; STAY
OF RELATED STATE COURT
ACTION)

LLC, an inactive Oregon limited liability company; BRAKE BROTHERS 3, LLC, an inactive Oregon limited liability company; BRAKE BROTHERS OF ALOHA, LLC, an inactive Oregon limited liability company, BRAKE BROTHERS OF MEXICO, LLC, an inactive Oregon limited liability company; GILBERT GUTIERREZ, LLC, an active Oregon limited liability company; TIGARD BRAKE TEAM, LLC, an inactive Oregon limited liability company; VANCOUVER BRAKE INC., an active Oregon corporation; BRAKE BROTHERS LLC, an inactive Washington limited liability company; BRAKE BROTHERS OF WASHINGTON LLC, an inactive Washington limited liability company; JUSTIN'S BRAKE TEAM, LLC; MILWAUKIE BRAKE, LLC, an inactive Oregon limited liability company; JBTTHREE, LLC, an active Oregon limited liability company; JBT 2 LLC, an active Oregon limited liability company; M&W INVESTMENTS LLC, an active Oregon limited liability company; BRAKE FORCE, LLC, an inactive Oregon limited liability company; TIGARD BRAKE FORCE, LLC, an active Oregon limited liability company; 82ND BRAKE FORCE, LLC, an inactive Oregon limited liability company; BEAVERTON BRAKE FORCE, LLC, an inactive Oregon limited liability company; and BROADWAY BRAKE FORCE, LLC, an inactive Oregon limited liability company,

Defendants.

The Chapter 7 Trustee, Rodolfo A. Camacho (the "Trustee"), by and through undersigned counsel, hereby files this adversary proceeding (the "Complaint") against Patrick Walby, Philip Walby, Justin McCann, Brittanny McCann, Juan Salas, Noemi Gutierrez (the "Individual Defendants") and Beaverton Brake Team LLC, Brake Brothers 3 LLC, Brake Brothers Of Aloha LLC, Brake Brothers Of Mexico LLC, Gilbert Gutierrez LLC, Tigard Brake Team LLC, Vancouver Brake Inc., Brake Brothers LLC, Brake Brothers Of Washington LLC, Justin's Brake Team LLC, Milwaukie Brake LLC, JBTTHREE LLC, JBT 2 LLC, M&W Investments LLC,

Brake Force LLC, Brake Office Force LLC, Tigard Brake Force LLC, 82nd Brake Force LLC, Beaverton Brake Force, LLC, and Broadway Brake Force LLC (the “Entity Defendants” and together with the Individual Defendants, the “Defendants”) and alleges:

JURISDICTION

This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. § 1409.

PROCEDURAL HISTORY

1. Brake Brothers, LLC dba Brake Team (“Debtor” or “Brake Brothers”) is an inactive Oregon limited liability company.
2. On April 16, 2014, an involuntary petition was commenced under Chapter 7 of the Bankruptcy Code for Debtor by creditors O’Reilly Automotive Stores, Inc., Summers and Associates, G & K Services Inc., Meyer Sign Co. of Oregon, Inc. (collectively, the “Petitioning Creditors”). [Dkt. 1]
3. On May 15, 2014, an Order For Relief was entered and Philip Walby, in his capacity as Manager, was designated to represent the debtor to perform the duties imposed under the Bankruptcy Code. Rodolfo A. Camacho was appointed Interim Trustee and a show cause hearing was scheduled for June 9, 2014. [Dkt. 5]
4. On June 9, 2014, Philip Walby failed to appear at the show cause hearing. [Dkt. 8] The Petitioning Creditors filed a Motion to Change Designation of the Person Designated to Perform the Duties of Debtor from Philip Walby to Patrick Walby (“Petitioning Creditors’ Motion”). [Dkt. 13]

5. A hearing was held on July 21, 2014 on the Petitioning Creditors' Motion and the Court ordered a change to the designation of the person to perform the duties of the Debtor to Patrick Walby. [Dkt. 17]

6. Patrick Walby was personally served on August 15, 2014 with the Order Granting Petitioning Creditors' Motion. [Dkt. 28]

7. On September 19, 2014, the Trustee filed an Application for Examination of Patrick Walby Under FRBP 2004. [Dkt. 37]

8. The Court granted an Order Granting Application for Examination of Patrick Walby Under Rule 2004 ("FRBP 2004 Order") whereby Patrick Walby was directed to appear for a 2004 examination on October 9, 2014. [Dkt. 39]

9. The Trustee served the FRBP 2004 Order along with a Subpoena For Rule 2004 Examination on Mr. Walby via first class U.S. Mail and attempted personal service of the Order and Subpoena For Rule 2004 Examination on Mr. Walby multiple times at multiple locations between September 25, 2014 and September 30, 2014. [Dkts. 46, 47]

10. On October 20, 2014, the Trustee filed a Motion For An Order To Show Cause As To Why Patrick Walby Should Not Be Held In Contempt, following Patrick Walby's failure to appear for the FRBP 2004 examination. The Court set a hearing sua sponte for December 4, 2014. [Dkts. 48, 52]

THE PARTIES

11. Debtor is an inactive Oregon limited liability company registered on October 30, 2008 and administratively dissolved on December 27, 2013. Patrick Walby is the Registered Agent and Philip Walby is the Manager.

12. At all relevant times, based on information and belief, Patrick Walby has been an individual residing in Washington County, Oregon.

13. Patrick Walby is the Member and Registered Agent of multiple business entities in the States of Oregon and Washington with names containing some variation of “Brake Brothers.”

14. Patrick Walby is the Plaintiff in a civil cause of action in Oregon County Circuit Court for Washington County, Case No. C142375CV (the “Civil Action”).

15. On or about April 24, 2014, Patrick Walby filed the Civil Action against Brake Force, LLC, Juan Salas, and Noemi Gutierrez, in his capacity as owner and manager of the Brake Team, LLC.

16. In the Civil Action, Patrick Walby asserts claims for breach of contract/quasi contract, conversion, unjust enrichment, trade secrets, injunction, and permanent injunction arising from the operation of Brake Force, LLC.

17. At all relevant times, based on information and belief, Philip Walby has been an individual residing in the State of Oregon.

18. Philip Walby is the Manager of Debtor and the Member and/or Registered Agent of more than one business entity in Oregon and Washington whose name contains some variation of “Brake Brothers.”

19. At all relevant times, based on information and belief, Justin McCann has been an individual residing in Clackamas County, Oregon.

20. At all relevant times, based on information and belief, Brittanny McCann has been an individual residing in Clackamas County, Oregon.

21. At all relevant times, based on information and belief, Juan Salas has been an individual residing in the State of Oregon.

22. At all relevant times, based on information and belief, Noemi Gutierrez has been an individual residing in the State of Oregon.

23. Beaverton Brake Team, LLC is an inactive Oregon limited liability company registered on May 4, 2011 and administratively dissolved on July 3, 2014. Its principal place of business is listed as 4125 SE 82nd Avenue, Portland, Oregon. Patrick Walby is the Registered Agent. The Members are Patrick Walby, Philip Walby, and Gary Stein.

24. Brake Brothers 3, LLC is an inactive Oregon limited liability company registered on March 16, 2009 and administratively dissolved on May 16, 2014. Its principal place of business is listed as 4125 SE 82nd Avenue, Suite B, Portland, Oregon. Patrick Walby is the Registered Agent and Philip Walby is a Member.

25. Brake Brothers Of Aloha, LLC is an inactive Oregon limited liability company registered on May 4, 2009 and administratively dissolved on July 2, 2010. Its mailing address is listed as 12035 SW Pacific Highway, #A, Tigard, Oregon. Patrick Walby is the Registered Agent and Salas is the Member.

26. Brake Brothers Of Mexico, LLC is an inactive Oregon limited liability company registered on May 7, 2010 and administratively dissolved on July 3, 2014. Its principal place of business is listed as 2326 NE Broadway, Portland, Oregon and its mailing address as 4125 SE 82nd Avenue, Portland, Oregon. Patrick Walby is the Registered Agent and its Members are Patrick Walby and Philip Walby.

27. Gilbert Gutierrez, LLC, an active Oregon limited liability company registered on June 23, 2014. Patrick Walby is the Registered Agent and Member. Its mailing address is 4125 SE 82nd Avenue, Suite B, Portland, Oregon.

28. Tigard Brake Team, LLC is an inactive Oregon limited liability company registered on May 4, 2011 and administratively dissolved on July 3, 2014. Its principal place of business is listed as 12035 SW Pacific Highway, Suite A, Tigard, Oregon and its mailing address is 4125 SE 82nd Avenue, Portland, Oregon. Patrick Walby is the Registered Agent and Member.

29. Vancouver Brake Inc. is an active Oregon corporation registered on September 8, 2014 by Patrick Walby, the Registered Agent. Its mailing address is 4125 SE 82nd Avenue, Portland, Oregon.

30. Brake Brothers Of Washington, LLC is an inactive Washington limited liability company filed on March 26, 2010 and dissolved on July 1, 2013. Its principal place of business is listed as Vancouver, Washington. Patrick Walby is the Registered Agent and its Members are Patrick Walby and Philip Walby.

31. Justin's Brake Team, LLC is an active Oregon limited liability company registered on October 14, 2013. Its principal place of business is 4125 SE 82nd Avenue, Portland, Oregon. Justin McCann is the Registered Agent and the Managers are Justin McCann and Brittany McCann.

32. Milwaukie Brake, LLC is an inactive Oregon limited liability company registered on June 2, 2014 and administratively dissolved on October 24, 2014. Its principal place of business is listed as 4125 SE 82nd Avenue, Suite B, Portland, Oregon. The Members are Justin McCann, Susan Mary Coon, and P. Schnitzer.

33. THREE, LLC is an active Oregon limited liability company registered on June 3, 2014. Its principal place of business is in Portland, Oregon. Justin McCann is the Registered Agent and the Managers are Justin McCann and Brittany McCann.

34. JBT 2 LLC is an active Oregon limited liability company registered on February 24, 2014. Its principal place of business is 2326 NE Broadway, Portland, Oregon. Justin McCann is the Registered Agent and the Managers are Justin McCann and Brittany McCann.

35. M&W Investments, LLC is an active Oregon limited liability registered on January 6, 2014. Its principal place of business is in Portland, Oregon. Justin McCann is the Registered Agent and the Members are Justin McCann and Brittany McCann.

36. Brake Force, LLC is an inactive Oregon limited liability company registered on August 2, 2013 and administratively dissolved on May 2, 2014. Its principal place of business is listed as Beaverton, Oregon and its mailing address is 12035 SW Pacific Highway, Tigard, Oregon. Noemi Gutierrez is the Registered Agent and Member.

37. Tigard Brake Force, LLC is an active Oregon limited liability company registered on August 2, 2013. Its mailing address is 12035 SW Pacific Highway, Tigard, Oregon. Noemi Gutierrez is the Registered Agent and Member.

38. 82nd Brake Force, LLC is an inactive Oregon limited liability company registered on August 2, 2013 and administratively dissolved on May 2, 2014. Its principal place of business is 4125 SE 82nd Avenue, Portland, Oregon and its mailing address is 12035 SW Pacific Highway, Suite A, Tigard, Oregon. Noemi Gutierrez is the Registered Agent and Member.

39. Broadway Brake Force, LLC is an inactive Oregon limited liability company registered on August 2, 2013 and administratively dissolved on May 2, 2014. Its mailing address is 12035 SW Pacific Highway, Suite A, Tigard, Oregon. Juan Salas is the Registered Agent and a Member.

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**COUNT I
(DECLARATORY JUDGMENT)**

40. The Trustee realleges and incorporates paragraphs 1 through 39 of this Adversary Complaint as though fully set forth herein.

41. This is an action for declaratory relief, pursuant to ORS 28.010 *et seq.*, 28 U.S.C. § 2201 (the “Declaratory Relief Act”), and other applicable law.

42. The Trustee requires a determination that the assets of the Entity Defendants are mere alter egos of Debtor, making their assets property of the bankruptcy estate.

43. Upon information and belief, the Debtor and the Entity Defendants are dominated and controlled by Patrick Walby and/or Philip Walby in such a way that they are merely alter egos of each other and are used to shield assets from creditors and obtain personal benefits.

44. Upon information and belief, the Entity Defendants are dominated and controlled by Patrick Walby and/or Philip Walby in such a way that they are merely alter egos of each other and are used to shield assets, siphon off the value of Debtor’s assets and reduce the pool of assets available to the Debtor’s estate to the detriment of its creditors.

45. Upon information and belief, the Entity Defendants do not observe corporate formalities.

46. Upon information and belief, the Entity Defendants are instrumentalities of the Debtor with no truly and separate independent existence.

47. Upon information and belief, the Entity Defendants are a direct continuation of the Debtor’s affairs, despite the not inconsiderable efforts by Patrick Walby and the Individual Defendants to obscure this reality.

48. Upon information and belief, there is a unity of interest and ownership common to the Entity Defendants, and that to adhere to the separate corporate entities theory would result in an injustice to Debtor's creditors.

49. Upon information and belief, at all relevant times, there has been no clear demarcation among the affairs of Debtor, the Entity Defendants, and/or the Individual Defendants, and that Debtor often commingled the assets, including intellectual property, of the Entity Defendants and/or the Individual Defendants.

50. Upon information and belief, many if not all of the Entity Defendants were inadequately capitalized at formation and at all relevant times thereafter.

51. WHEREFORE, the Trustee requests that this Court enter a declaratory judgment finding that (1) the Debtor and Entity Defendants are alter egos of each other under state law, (2) the Entity Defendants and their assets including, but not limited to, their accounts, assets, equipment and inventory, goodwill and intellectual property are part of Debtor's bankruptcy estate under 11 U.S.C. §541, (3) authorizes the Trustee to administer and liquidate these assets for the benefit of the creditors of the Debtor's estate, and (4) for such other and further relief as this Court deems necessary and appropriate.

COUNT II
(Substantive Consolidation)

52. The Trustee realleges and incorporates paragraphs 1 through 39 and 41 through 51 of this Adversary Complaint as though fully set forth herein.

53. This is a claim for substantive consolidation of the Entity Defendants and Individual Defendants into Debtor's Estate, pursuant to §105(a) of the Bankruptcy Code, as explicated in the precedential case law of this Circuit.

54. Upon information and belief, there is a unity of interest and ownership common to the Entity Defendants, and that to adhere to the separate corporate entities theory would result in an injustice to Debtor's creditors.

55. The facts asserted above indicate that substantive consolidation of the Debtor and the Entity Defendants and assets of the Individual Defendants should occur because, upon information and belief: (1) creditors dealt with the Entity Defendants as a single economic unit and did not rely on their separate identity in extending credit and/or (2) the affairs of the Debtor and the Entity Defendants and Individual Defendants are so entangled that consolidation will benefit all creditors.

56. WHEREFORE, the Trustee respectfully requests that this Court enter a judgment for substantive consolidation of the Debtor and the Entity Defendants and Individual Defendants, and for such other and further relief as this Court deems necessary and appropriate.

COUNT III
**(Avoidance of transfers of property under 11 U.S.C. §§ 544(b)(1), 548 and 549
and ORS § 95.200 *et seq.*)**

57. The Trustee realleges and incorporates paragraphs 1 through 39, 41 through 51, and 52 through 56 of this Adversary Complaint as though fully set forth herein.

58. Under Section 544(b)(1) of the Bankruptcy Code, the Trustee may avoid "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title."

59. Under ORS § 95.230, transfers are fraudulent as to present and future creditors when the debtor makes them with (a) with actual intent to hinder, delay, or defraud its creditors or (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and

the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtors ability to pay as they become due.

60. Under ORS § 95.240, transfers are fraudulent as to present creditors when the debtor makes them (1) to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor becomes insolvent as a result of the transfer or obligation or (2) to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for other than a present, reasonably equivalent value, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent.

61. Under Section 548(a)(1) of the Bankruptcy Code, the Trustee may avoid transfers made with “actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted” or if the debtor received less than a reasonably equivalent value in exchange for such transfer or obligation.

62. Under Section 549, the Trustee may avoid unauthorized transfers of estate property of the estate that occurs after the commencement of the case.

63. Upon information and belief, Debtor, through Patrick Walby and/or Philip Walby, engaged in prepetition and post-petition transfers in violation of 11 U.S.C. §§ 544(b)(1) and 548 and ORS § 95.200 *et seq.* to the Defendants with actual intent to hinder, delay and defraud Debtor’s creditors and/or impressible post-petition transfers under § 549.

64. The intent to hinder, delay and defraud Debtor's creditors is further demonstrated by the facts and circumstances, whereby Patrick Walby and/or the Individual Defendants registered multiple similarly-named Oregon business entities in the months leading up to and since the filing of the Petition which are dominated and/or controlled by Patrick Walby and/or the Individual Defendants.

65. WHEREFORE, the Trustee respectfully requests that the Court enter judgment in his favor and against Defendants and order that any transfers by Debtor to Defendants or by Defendants are avoided by the Trustee and preserved for the benefit of the bankruptcy estate. Under § 550(a), the Trustee is entitled to recover for the benefit of creditors the property or the value thereof.

COUNT IV
(Injunction Under 11 U.S.C. §§ 105(a), 362(a), and ORS Chapter 28
Staying the Civil Action)

66. The Trustee realleges and incorporates paragraphs 1 through 39, 41 through 51, 53 through 56, and 57 through 65 of this Adversary Complaint as though fully set forth herein.

67. This is a claim for injunctive relief pursuant to 11 U.S.C. § 105(a), Chapter 28 of Oregon Revised Statutes to stay the Civil Action filed by Patrick Walby against Brake Force, LLC and its members, Juan Salas and Noemi Gutierrez.

68. Patrick Walby, in his individual capacity, asserts multiple claims against the defendants in the Civil Action arising from the defendants' operation of Brake Force, LLC.

69. The claims asserted by Patrick Walby in the Civil Action are not personal in nature, but are for breach of contract/quasi contract, conversion, unjust enrichment, trade secrets, injunction, and a permanent injunction arising from the operation of Brake Force, LLC.

70. The claims in the Civil Action belong to Debtor and are claims of the bankruptcy estate.

71. The Court should use its powers under 11 U.S.C. § 105(a) to enjoin the Civil Action because Patrick Walby, in filing the Civil Action, is attempting to exercise control over property of the estate and is violating the automatic stay.

72. WHEREFORE, the Trustee respectfully requests that the Court stay the Civil Action during the pendency of this bankruptcy case.

V. RELIEF REQUESTED

WHEREFORE, The Trustee respectfully requests that this Court grant the following relief:

1. A declaratory judgment finding that (1) the Debtor and Entity Defendants are alter egos of each other under state law, (2) the Entity Defendants and their assets including, but not limited to, their accounts, assets, equipment and inventory, goodwill and intellectual property are part of Debtor's bankruptcy estate under 11 U.S.C. §541, (3) authorizes the Trustee to administer and liquidate these assets for the benefit of the creditors of the Debtor's estate, and (4) for such other and further relief as this Court deems necessary and appropriate;
2. A judgment for substantive consolidation of the Debtor and the Entity Defendants and Individual Defendants under §105(a) of the Bankruptcy Code;
3. A judgment in favor of the Trustee and against Defendants and order that any transfers by Debtor to Defendants or by Defendants are avoided by the Trustee and preserved for the benefit of the bankruptcy estate and that, under § 550(a), the Trustee is entitled to recover for the benefit of creditors the property or the value thereof.

4. Stay the Civil Action during the pendency of this bankruptcy case under 11 U.S.C. §§ 105(a), 362(a), and ORS Chapter 28;
5. An award of costs and attorney fees based on any recognized ground in law or equity; and
6. Such other and further relief as the Court may deem just and equitable.

DATED: November 21, 2014

GOLDBERG LAW NW, LLC

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